Supreme Court, U.S.
FILED

97 2027 JUN 15 1998

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

HARLAN L. JACOBSEN

Petitioner

vs.

STATE OF SOUTH DAKOTA

Respondent

Petition for a Writ of Certiorari to the
Supreme Court of the State of South Dakota

PETITION FOR WRIT OF CERTIORARI

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June 12, 1998

QUESTIONS PRESENTED

1. Is distributing your views and ideas on public forum sidewalks a constitutionally protected privilege open to all, or just to those with popular views who can pay?

2. Have the petitioner's privileges, protections and constitutional rights under the First and Fourteenth Amendment and the Free Press clause been violated by the South Dakota sales tax and state actions choking off his publication?

LIST OF PARTIES

All parties are listed in the caption on the cover page.

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Petition for a Writ of Certiorari to the
Supreme Court of the State of South Dakota

PETITION FOR WRIT OF CERTIORARI

Harlan L. Jacobsen respectfully petitons for a writ of certiorari issue to review the judgement of the South Dakota Supreme Court.

OPINIONS BELOW

The opinion of the South Dakota Supreme Court appears in Appendix A to the petition and is unpublished.

JURISDICTION

The South Dakota Supreme Court entered its judgment March 23, 1998. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1257 (a).

STATUTES INVOLVED

UNITED STATES CONSTITUTION
AMENDMENT ONE

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT FOURTEEN

Part 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves important questions related to First Amendment free press rights. The Petition for a Writ of Certiorari should be granted because the South Dakota Surpeme Court decision directly contradicts previous U.S. Supreme Court and other higher court rulings regarding the constitutionality of taxation of newspaper distribution and imposition of a differential burden that chokes off certain publications.

Certiorari should also be granted because the South Dakota ruling, if allowed to stand, opens the way for other state and local governments to impose taxes on a previously protected Constitutitonal right and will suppress less popular views and ideas.

Further, Certiorari should be granted because the State asked for and received a more severe penalty because of Petitioner's exposing the state's actions using his First Amendment rights to publicize their suppression of his disliked newspaper.

*****

Before the case here, defendant placed a newsrack on the sidewalk of a South Dakota highway rest stop. The newsrack was seized without notice by the SD Highway Department. Defendant demanded its return to the sidewalk but the Highway Department refused. A year of correspondence with the Highway Department, Attorney General's office, and Governor's office over First Amendment rights were ignored, apparently as a result of a dislike for the content of petitioner's newspaper.

Defendant went to U.S. District Court, *pro se*, Jacobsen *vs.* Howard, over the First Amendment rights to distribute on reststop sidewalks, and these rights were enforced. The state appealed. Meanwhile, the State continued to relocate to obscure places and hassle defendant's newsracks at rest stops.

In 1996 the State legislature imposed a tax on newspaper sales:

> SDCL §10-45-2 provides:
> There is hereby imposed a tax upon the privilege of engaging in business as a retailer, a tax of four percent upon the gross receipts of all sales of tangible personal property consisting of goods, wares, or merchandise, except as taxed by 10-45-3 and except as otherwise provided in this chapter, sold at retail in the State of South Dakota to consumers or users." In 1995, retail sales of newspapers was deleted as an exemption under SDCL §10-45-12-1.

The defendant absorbed the tax for a while, but the administrative costs made the burden too great. He notified the State to cancel his license, because the tax was economically destroying his newspaper distribution and was a constitutional infringement on a protected privilege.

The State's Attorney wrote back to petitioner with his tax views and asked for a response. Defendant responded in 3 days and asked for any Court citations of actions upholding the State's position on the constitutionality of the tax. The State never responded to the letter but instead revoked the petitioner's sales tax license, and indicted the defendant as a criminal felon for refusing to pay sales tax on his newspaper distribution. (In an abuse of process, the State then tried to close defendant's Video Store over the newspaper,

revoking the stores' sales tax license. This was stopped and withdrawn only by threatened exposure in the daily newspaper of what they were doing.)

Shortly thereafter, the U.S. Court of Appeals found in defendant's favor in the rest stop case appeal, generating more animosity and hostility from the SD Attorney General's Office.

Defendant filed a Motion to Dismiss the State tax action on constitutional grounds. The State Court denied (Appendix C) and stated that unlike defendant's previous Federal cases on constitutional issues (16 cases in 25 years covering nine States), "distribution was not involved in this case."

Defendant was tried before a jury and was not allowed to bring up constitutional rights, due to the Judge's decision that constitutional rights were not at issue and distribution was not involved.

In the lower Court jury trial, it was shown that defendant's receipts from newsrack distribution were approximately $350.00 a month in South Dakota. The resulting $20 or so tax might be absorbed, except that with statewide newsrack distribution in 50 or 60 locations (towns), bookkeeping at each town, and overall bookkeeping with a different tax rate in each town on the State form, resulted in total administrative burden of over $200, often over half of receipts. This was not refuted by the state.

The jury found defendant guilty as a criminal felon for failing to bookkeep and pay the sales tax and for distributing his newspaper with a revoked tax license (Appendix B).

At the sentencing hearing, the State Attorney General's office requested that because defendant had widely publicized and made many public disparaging remarks about what the State and Court were doing in this matter, he should be severely penalized. Defendant was sentenced to 95 days in jail, 94 suspended on his immediately discontinuing distribution, fined $1000, and assessed over $8,000 in costs.

Defendant filed Notice of Appeal to the State Supreme Court and asked for a Stay until decided. The stay was denied. The petitioner's appeal to the state Supreme Court was based entirely on constitutional rights. The South Dakota State Supreme Court denied defendant's appeal, and was silent on the constitutional issues in their ruling (Appendix A).

Defendant filed a "Stay of Mandate" until such time as the U.S. Supreme Court had disposed of the matter. This motion for a stay was denied.

Petitioner was jailed as a criminal felon for refusing to give up his constitutional right to distribute his newspaper.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. Is distributing your views and ideas on public forum sidewalks a constitutionally protected privilege open to all, or just to those with popular views who can pay?

The Supreme Court of the State of South Dakota has here set a precedent by ruling on an important question of federal law regarding the First Amendment that has not been decided or ruled on definitively by the U.S. Supreme Court. The State Court ruling is in direct conflict with the Supreme Court's traditional rulings over the last fifty years in regard to newspaper distribution on public forum sidewalks.

The question left open is whether the State Court is correct that what has until now been a constitutional privilege open to all has been recently downgraded to allow the states to profit from charging fees/taxes on distributing paid publications on public sidewalks, thus making such distribution open only to those with popular views who can pay.

Before petitioner was indicted, he responded to the state attorney's correspondence with a letter asking, "Now if you know of several significant (past the lower court level) cases that have upheld licensing and taxing to profit the government agency, as you propose, I would like to have you send me a copy."

Since no such definitive Supreme Court ruling on state sales tax on newspaper sidewalk sales exists, the State never responded, but instead, as a result, hastily indicted the petitioner as a criminal felon for failing to pay the tax in question.

The state's original letter to petitioner in response to petitioner's request to cancel his sales tax license as unconstitutional, listed several situations that would make such a tax constitutionally suspect.

> "The case law relating to fees or taxes imposed on publication sales indicates that a tax generally applicable to all businesses is constitutional. The taxes or fees are suspect if (1) they are based on circulation; (2) they treat the press differently than other business segments; (3) they treat segments within the press differently; or (4) they make the selling operation economically impossible. South Dakota's sales tax does not operate in a fashion which brings either of the above into play."

In actuality, petitioner's situation met each of them, brought out in full in the appeal brief, and mentioning two (numbers one and four) in petitioner's response letter, to which the State never responded.

This and other small newspapers' plight has generated no court actions resulting in definitive rulings because small publishers cannot afford the legal fees and the years of delay involved in resolving the constitutionality of such a tax; they just quietly go out of business. Large popular papers have not contested the sales tax because with different distribution (mostly with carriers), they can pass the cost on more effectively to their readers. And with large sales volume, their bookkeeping cost is insignificant. In fact, the popular large papers prefer to keep the tax because at little expense to them it heavily burdens and chokes off smaller competitors and start-up publications, improving the large paper's control of the market and suppressing competition from other views and ideas.

Petitioner has brought up free press rights and First Amendment protections throughout this case, including correspondence before the indictment. After the indictment, he filed a motion to dismiss on Constitutional grounds. The Court's ruling denying the motion to dismiss (Appendix C) said,

> "According to Minneapolis Star Tribune and Swaggart, the Motion to Dismiss the Indictment is denied. Mr. Srstka shall prepare an Order to this effect within 10 days. The trial schedule for the week of March 10th will proceed as scheduled."

Constitutional and free press rights were not allowed to be brought up during the jury trial, because the Court had already directed the jury that these rights were not at issue in the case.

Petitioner's letter to the state attorney before indictment brought up the Minneapolis Star citation.

> *"A tax that burdens rights protected by the First Amendment can not stand unless the burden is necessary to achieve an overriding government interest"* Minneapolis Star and Tribune. 460 U.S. 575. 582-583 (1983).

Since the Court here ruled that the constitutional issues were approved for the state tax by Minneapolis Star, the Court, in denying dismissal, must have ignored the "cannot stand unless the burden is necessary to achieve an overriding governmental interest" portion.

This also appears in petitioner's appeal brief, page 6,

> The Supreme Court, in striking down the Minnesota tax Minneapolis Star Id at 592, said second, *"even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."*

1. This tax on the privilege of distributing newspapers, and the resulting judicial review, have not met the strict scrutiny test required when a protected right is restricted.

Petitioner's appeal brief, page 17, says,

> *"Our First Amendment analysis depends on the type of forum being regulated. In a traditional public forum or a public forum by government designation, First Amendment restrictions are subject to strict scrutiny."* Board of Airport Commissioners vs. Jews for Jesus 482 U.S. 569, 572-73 (1987), U.S. Court of Appeals Jacobsen vs. Howard (1997), quoting the above.

On page 15 and 16 of petitioner's appeal brief it is noted,

> "Because this case concerns the fundamental guarantees of freedom of speech and press, this Court has to apply a more stringent standard of review; it cannot merely rely on facts minimally sufficient to sustain a finding upon review."
>
> The Court: must *"make an independent examination of the whole record (citation), so as to assure (itself) that the (challenged conduct) does not*

constitute a forbidden intrusion on the field of free expression."

If the guarantees of the First Amendment are to be taken seriously, rather than merely to receive lip service, free expression cannot validly be inhibited absent a compelling evidentiary showing of the need to do so sufficient to overcome the heavy presumption that such an inhibition is constitutionally invalid. Pittsburgh Unified School District vs California School Employees Assn. (1985) 166 Ca. App. 3d 875, 890, 894 (quoting NAACP vs. Claiborne Hardware Co. (1982) 458 U.S. 896 and New York Times vs Sullivan (1964) 376 U.S. 254).

First Amendment rights occupy a preferred position among constitutional rights. Murdock vs. Pennsylvania, 319 U.S. 105 (1943). *Cases adjudicating First Amendment rights apply the strict scrutiny standard. For a government to prevail under the strict scrutiny standard, the government must show a compelling governmental interest in upholding the statute or regulation, and that the statute or regulation is the least restrictive means available to further the government's interest.* Talley vs. California, 362 U.S. 60 (1960).

The appeals brief notes on page 42,

Courts apply strict scrutiny to statutes that infringe on First Amendment rights. Laws against protected activities that result in limitation of free expression must be justified by compelling state interests. (citations) see Wright vs Chief of Transit Police (2nd Cir. 1977) 558. F.2d 67, 68 n.l; Southern N.J. Newspapers, supra 542 F.Supp at 18. *Whenever the government seeks to limit speech activities in the traditional public forum of public streets and sidewalks, the government must satisfy the strict scrutiny test, i.e. the government must show a compelling state interest narrowly served by the regulation.*

e.g. In re Berry (1968) 68 Cal. 2d 137, 154; Pittsburgh Unified School District vs California School Employees Assn. (1985) 166 Cal. App. 3d 875, 891. *The compelling state interest, or strict scrutiny, test was set forth as follows: "It must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.* Elrod at 363, 96 S. Ct. at 2685. Elrod v. Burns, 96 S.Ct. 2673, 2685, 427 U.S. 347-364, 49 L. Ed. 2d 547 (1976).

On page 42 the appeal brief cites,

The government must also prove that "either the interest cannot be satisfied by alternative methods less restrictive of the right abridged or that the state action employs the least drastic means to achieve the governmental interest." Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir.1976). See also Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), cert. denied Lepzig v. Baldwin, 87 S.Ct. 2173, 431 U.S. 913, 53 L.Ed.2d 223; Russo v. Central School Dist. No 1 Town of Rush, Et Al. Monroe County, State of N.Y., 469 F.2d 623 (2d Cir. 1972), cert. denied 93 S.Ct. 1899, 411 U.S. 932, 36 L.Ed.2d 391. *"In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity."* NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

There are many less restrictive ways to enhance revenue without negating rights. Thus the South Dakota tax fails the strict scrutiny test and is unconstitutional.

2. Applying this tax to newspaper distribution creates a fee for what has been a protected forum open to all, in contradiction to previous Court rulings on the First Amendment.

The United States Court of Appeals for the Second Circuit struck down a $15 annual license fee imposed on the distribution of

newspapers by the City of Mount Vernon, noting:

> There can be no doubt that if this statue were construed to apply to the sale of plaintiffs' newspaper, it would be unconstitional. It has long been established that "[a] state may not impose a charge for the enjoyment of a right granted by the Federal Constititon." (citations omitted). The ability to pay is not a legitimate criterion for the state to employ in determining who is to express his views on its streets and who is not. Therefore any fee imposed as a pre-requisite to the exercise of the right to communicate ideas on the public sidewalks is an unconstitutional prior restraint upon the freedom of expression. Hull v. Petrillo, supra, 439 F.2d at 1186.

In the past the courts have consistently ruled that license fees that are imposed to raise general revenue or exceed administrative costs create an invalid prior restraint on the exercise of a fundamental right. Murdock v. Pennyslvania, supra; Hull v. Petrillo, supra; Bayside Enterprises v. Carson, 450 F.Supp. 696 (M.D. Fla. 1978); International Society v. Griffin, 437 F.Supp 666 (W.D. Pa. 1977); Gall v. Lawler, 322 F.Supp. 1223 (E.D.Wisc. 1971); NAACP v. Chester, 253 F.Supp. 707 (E.D. Pa. 1966).

South Dakota's decision to apply their sales tax to newspaper distribution has created just such a license fee, since they have demonstrated with this case that without the license, there can be no paid newspaper distribution. It matters not whether the tax is prior or after the sale; it is a tax on the privilege of distributing your views and ideas, and thus suppresses them.

In petitioner's motion to dismiss his indictment on constitutional grounds, petitioner's memorandum quoted,

> Fee requirements have been repeatedly struck down as nothing more than a tax on First Amendment rights. See Hull vs Petrillo, 439 F.2d 1184, 1186 (2nd Cir. 1971); Miami Herald, slip op. at 10. Only a few cases have permitted fee assessment, and then only when the purpose is solely to offset administrative costs. See Miami Herald, slip op. At 11-12.

Petitioner's appeal brief, page 15, acted to clarify sidewalk distribution as a protected activity.

"We agree . . . that the dissemination of protected material on public streets by means of newsracks falls within the constitutional guarantees of freedom of speech and freedom of the press." Gannett Satellite Info. Network vs Town of Norwood (D. Mass. 1984) 579 F.Supp. 108, 114; Southern N.J. Newspapers vs. New Jersey (D.N.J. 1982) 542 F. Supp. 173.

"Because a sidewalk is a traditional public forum for First Amendment activity, it follows that a sidewalk is an appropriate place to engage in the constitutionally protected activity of distributing newspapers through newsracks." See Jacobsen vs U.S. Postal Service, 812 F.2d 1151 (9th Cir. 1987) *"[A] statute placing restrictions on newspaper vending machines on sidewalks owned by federal government imposed a substantial handicap on traditional use of a traditional public forum and raised a serious question of constitutional dimension, entitling newspaper publisher to preliminary injunction prohibiting enforcement of the statute)."* Jacobsen vs. Petersen 728 F. Supp. 1415 (DSD 1990).

"But to say that they like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege." Follett vs. Town of McCormick, S.C. 321 U.S.

Had there been a definitive Court ruling saying that distributing newspapers on the public sidewalk was no longer a constitutionally protected activity open to all and now allowed the state to require a tribute be paid for the privilege, petitioner would have discontinued operation in South Dakota, instead of becoming a convicted criminal felon for trying to save his publication.

If the free press clause and First Amendment have not been downgraded and are still a protected privilege open to all without a tribute, the State of South Dakota needs to know that too, so that they stop using this tax to rid the state of a newspaper they do not like.

3. The State of South Dakota is profiting from restricting a protected activity.

Petitioner filed this in the second page of his memorandum on the motion to dismiss indictment on constitutional grounds, 2nd page,

> *"A governmental entity cannot profit by imposing a licensing fee on a First Amendment right."* Murdock vs. Pennsylvania, 319 U.S. 105, 113-14, 63 S.Ct. 870, 875, 87 L.Ed. 1292 (1943), fees that cover only the administrative costs of the license are permissible." Jacobsen vs. Crivaro, 851 F.2d 1067, 1071 (8th Cir. 1988) (citing Eastern Connecticut Citizens Action Group vs. Powers, 723 F.2d 1050, 1056 (2d Cir. 1983). "Licensing fees used to defray administrative expenses are permissible, but only to the extent necessary for that purpose."), Jacobsen vs. Harris, 869 F.2d 1172, 1174 (8th Cir. 1989) (quoting Crivaro).

4. This tax applied to paid newspaper distribution is discriminatory because competing newspapers with free distribution, out-of-state newspapers, and electronic media competitors are not burdened at all.

Free, out-of-state and electronic publications can have large income and receipts and pay no tax or bookkeeping burden at all under this state law. In contrast, small special interest, wide-area papers distributed by newsracks must absorb the tax and large bookkeeping burden, recording a few sales at a different tax rate in each of a large number of towns. Meanwhile, a popular daily can pass the tax on and the large volume makes the administrative cost per paper sold insignificant.

The Court's ruling denying the motion to dismiss, (APPENDIX C) page 2, last paragraph, says,

> The United States Supreme Court quoted Minneapolis Star Tribune, *"Indeed, our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible."* 493 U.S. 373, 388, 110 S.Ct. 688, 107 L.Ed.2d 796, 808 (1990). Accord Arkansas Writers' Project Inc. vs. Ragland, 481 U.S. 221, 229, 107 S.Ct.

1722, 95 L.Ed.2d 209 (1987) *("[A] genuinely nondiscriminatory tax on the receipts of newspapers would be constitutionally permissible").*

The South Dakota tax is not nondiscriminatory, since popular, highly profitable papers distributed free pay no tax on income or receipts whatsoever, because this tax is not on income or receipts but is strictly a tax on the "privilege" of retailing (distributing, for pay, your views and ideas). It is not a genuinely nondiscriminatory tax on receipts because it is not levied on receipts. The Swaggart case regarding sales tax on religious items was also cited by the State (APPENDIX C) as constitutional justification, but Swaggart was on sale of religious items, not on First Amendment newspaper sales on public forums, which is the matter at issue here.

Petitioner's appeal brief, page 23, says,

"While a more onerous tax rate than California's, even if generally applicable, might effectively choke off an adherent's religious practices, that situation is not before or considered by this court." pp. 693-697 Jimmy Swaggart Ministries v. Bd. of Equal. 110 S.Ct 688 (1990).

Here it is demonstrated that the tax does choke off a protected activity.

5. The tax creates a differential burden in that it suppresses small alternative publications and chokes off less popular newspapers and starts which depend primarily on newsracks for circulation, while merely being passed on by popular large newspapers.

The large popular papers do not contest the matter because they can pass the tax on to readers. They like the tax because with it the government chokes off small competitors and start-ups with opposing and comeptitive views.

Desktop computer composition makes start-up publications with alternative views easy to produce. Easy access to publishing and the right to publish are worthless, however, when newsracks on sidewalks, the primary distribution method of small newspapers and start-ups, is choked off by a South Dakota tax that only they must absorb. With low circulation, the bookkeeping cost becomes a high percentage of receipts, choking off distribution and making the right

to publish worthless.

6. The State is using a differential burden to economically destroy a disfavored publication.

> *"Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"* Police Dept. of Chicago v. Mosley, 408 U.S. at 95. See also Corey v. Brown, 447 U.S., at 462-463.

Petitioner's motion to dismiss memorandum, stated,

> *"A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution . . . The power to impose a license tax on the exercise of [First Amendment] freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down."* Murdock vs. Pennsylvania, 319 U.S. 105, 133 (1943).

Here the South Dakota state tax is the same as censorship because it silences one voice, a voice that the State has demonstrated they do not like.

The appeal brief, on page 30, noted,

> *A community may not suppress, or the State tax, the dissemination of views because they are unpopular, annoying or distasteful.* Murdock vs. Pennsylvania 319 U.S. 116, 635 Ct. Syllabi: The First Amendment No 480, at #8, P. 116.

The Court's ruling denying the petition to dismiss (Appendix C), last paragraph, said, "According to Minneapolis Star Tribune and Swaggart, the motion to dismiss is denied."

Petitioner's appeal brief, page 21, quotes,

> Under Minneapolis Star, the tax in that case was struck down on a "differential burden." *"Even when structured in a manner that is content neutral, a scheme that imposes differential burdens on like-situated members of the press violates the First Amendment because it poses the risk that the State might abuse this power."* See Minneapolis Star, Supra, at 592.

While the tax percentage levied here is equal, the burden is

not. The administrative burden, as it affects only one type of newspaper due to its unique format and distribution systems, can and is being used to destroy that one paper. This burden, unique to one minority unpopular paper, is many times the burden of the tax. Popular newspaper's administrative cost on this tax law is only a small percentage of distribution receipts. In this one newspaper, however, the administrative burden alone exceeds ten times the tax and uniquely only this one newspaper must absorb both the tax and the huge administrative cost.

This tax in practice not only has potential for governmental abuse, it is demonstrated here that the State is using this burden to destroy the one publication that they have been demonstrably harassing and trying to rid from State property for years.

> *"It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press." The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital course of public information.* Grossjean v. American Press Co., 297 U.S. 233 1936.
>
> *"The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious* (Grossjean v. American Press Co. supra: Murdock v. Pennsylvania, supra) *as the imposition of a censorship or a previous restraint."* Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357. *For, to repeat, "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment."* Murdock v. Pennsylvania. Supra, 319 U.S. page 112, 63 S. Ct. page 874, 87 L. Ed. 1292, 146 A.L.R. 81.64 S.G. Follett v. Town of McCormick, S. C. - 577 - 4.

Petitioner's motion to dismiss, page 1 of Affidavit, says,

> *Solo* [the newspaper's name is *Solo RFD*] *distribution in many SD towns and cities have been priced out and been previously discontinued due to*

rising costs in the last 3 years. Upon analyzing the sales tax issue in SD, we now found the bookkeeping costs were going to totally kill distribution of this publication in SD if allowed to continue.

An example was Redfield, SD. We had a newsrack right on the street we went thru on traveling to newsracks in Aberdeen. That rack took in less than $5.00 a month; in the winter, about $2.00 per month. Even just the time to stop and put papers in the rack was not being paid for by the sales. Adding in bookkeeping for sales tax, the driver has to stop, get out his book, count individual quarters, write down how many quarters he took in in Redfield. He has to enter it in his book under Redfield, which he has to find. When he gets back to Sioux Falls, the bookkeeper has to pick that up, enter it in the computer, make up a sheet for Redfield, and arrange to pay $.05 to the City of Redfield on the sales tax form, for $5.00 income. We calculate this labor and equipment costs us about $2.50 in time and material to bookkeep. If we do $5.00 in sales, pay $.05 to Redfield, $.25 to the state, and $2.50 bookkeeping, a total of $2.80 leaves us only $2.20 to pay for the papers, the driver, his mileage, cost of newsrack, motel, etc., so we are forced to discontinue service to Redfield.

This tax is a restriction on the free press that destroys the paper's distribution in SD, not just Redfield. Pull half the towns out as no longer feasible, and you can't afford to travel the miles to the others. Therefore, when this comes up we are forced to take a stand and seek enforcement of constitutional protections to survive.

Petitioner's Appeal Brief, page 24, regarding Swaggart (which was not about public forum free press sales and did not choke off the activity), nevertheless noted,

> The Court here relied, in part, on the Jimmy Swaggart case, but ignored the Court's observation. *"Crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town" we face*

no such situation in this case. Jimmy Swaggart Ministries vs. Bd. of Equal. S.Ct. 688 (1990) 493 - U.S. 393.

7. Certiorari should be granted to resolve the State Supreme Court's error in ruling that First Amendment rights are not involved when the South Dakota application of this tax to newspaper distribution denies rural residents their right to access all views and ideas.

Petitioner's appeal brief, pages 43 and 44, states that SD Tax on newspaper circulation compromises recognized First Amendment protections of parties not before the Court.

> *The protection accorded liberty of circulation is grounded not only in the newspaper's right of publication, but also in the public's right of access to newspapers.* See Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555, 576, 100 S.Ct. 2814, 2827, 65 L.Ed.2d 973 (1980). Philadelphia Newspapers, Inc. v. Borough of Swarthmore, 381 F.Supp. 228, 243 (E.D. Pa. 1974)
>
> The First Amendment also protects access to communications. Franceschina vs. Morgan, 346 F.Supp. 833 (S.D. Ind. 1972). It *"gives to potential audiences the untrammeled access to all possible information, ideas, and views."* Williams vs. Blount, 314 (rights of third persons) standing. See, e.g. Craig vs. Boren, 429 U.S. 190 (1976), Singleton vs. Wulff, 428 U.S. 106 (1976).

The minority interest information, ideas and expression in Solo RFD newspaper are designed to serve and fill the needs of rural singles in sparsely populated areas. These citizens' rights to access this publication in sparsely populated areas in SD are choked off by this tax.

II. The question presented has substantial continuing importance to the exercise by individual citizens of First and Fourteenth Amendment rights.

Petitioner's appeal brief, on page 27, notes that the SD tax violates the equal protection clause of the 14th Amendment as well

as the First Amendment.

> *"Inflicting a competitive disadvantage on a disfavored medium violates the First Amendment 'command that the government . . . shall not impede the free flow of ideas.'"* Associated Press vs. United States, 326 U.S. 1, 20 (1945).

This tax discriminates with differential burdening between competing media and between like members of the press, and the State is using the differential burden to suppress one disfavored newspaper.

The appeal brief, on page 38, states,

> *Liberty of the press is a fundamental right protected against state aggression by the due process clause of the Fourteenth Amendment.* P. 242 Grossjean vs. American Press Co., 297 U.S. 242.

On page 43 the appeal brief says,

> *"The free press guarantee is, in essence, a structural provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution."* Stewart, "Or of the Press." 26 Hastings L.J. 631, 633 (1975).

The appeal brief, notes on page 36,

> Defendant used his protected First Amendment rights to expose the State's actions and his reason for not giving up his rights no matter what tactics they used, including branding him a convicted criminal felon for doing so. The State Attorney requested the court assess a more severe penalty for petitioner's publicly criticizing the State and the Court complied (sentencing transcript, page 2, line 8).

Thus petitioner was penalized for exercising his free press and First Amendment right to call the public's attention to governmental abuses of basic freedoms.

As the appeal brief says on page 48,

> If, however, this Court finds that Defendant has

shown that the tax is not on income or receipts but solely on protected distribution; is not genuinely nondiscriminatory as applied to Solo RFD, other newspapers, other media and other businesses; that the Defendant has proven there is a differential burden only on distribution on this publication compared to other newspapers, other media and other businesses; then the Court, under Minneapolis Star and Arkansas Writer's Project as controlling, must find similarly as they found, striking down the tax as unconstitutional because of a differential burden on certain publications, and since they were struck down for opening up a risk of governmental abuse, that should also be considered here, since actual government abuse is apparent. It is evident that the State has advanced no counter-balancing compelling or overriding justification to suppress a protected activity when there are numerous other means available to enhance revenue that do not intrude on protected rights.

South Dakota should not be an island where free press and First Amendment rights are not honored, where these rights are valued so low that they can be sold out for a few dollars that could be easily raised by other means.

This matter affects the trend to there being only a few large publications controlling views and ideas available to the American public. This tax creates a differential burden that can suppress small, alternative, low-circulation publications and can be used to destroy a publication the government does not like. The very liberty our fore-fathers fought for can be gravely affected by this suppression of a variety of voices and ideas.

Petitioner's appeal brief, page 8, quotes,

"A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." Grosjean v. American Press Co., 297 U.S. 233 (1936) 297 - U.S. 233.

And on page 14 petitioner's appeal brief quotes,

"Our liberty depends on the freedom of the press,

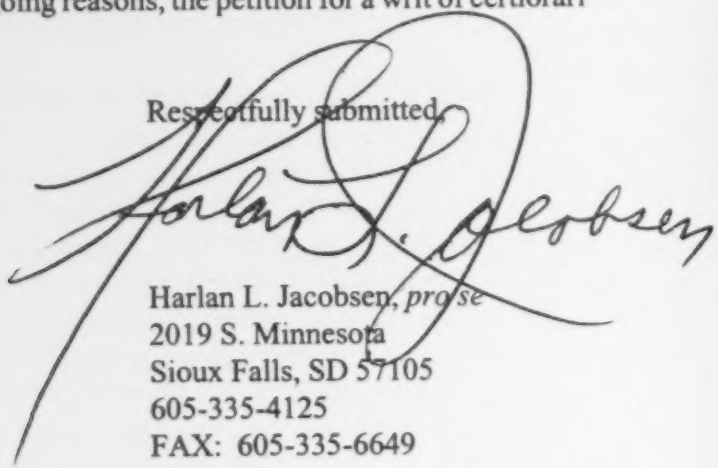
and that cannot be limited without being lost." Thomas Jefferson, 1786.

CONCLUSION

The public interest and the future of freedom from governmental abuse are tied to continuing and strengthening traditional First Amendment and free press rights which have been the key to maintaining our free society.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Harlan L. Jacobsen, *pro se*
2019 S. Minnesota
Sioux Falls, SD 57105
605-335-4125
FAX: 605-335-6649

Dated: June 12, 1998

APPENDIX A

Filed Supreme Court of South Dakota February 23, 1998

In the Supreme Court of the State of South Dakota

Order Directing Issuance of Judgment of Affirmance #20099

State of South Dakota, Plaintiff and Appellee,
vs
Harlan L. Jacobsen, d/b/a Solo R.F.D., Defendant and Appellant.

The Court having, pursuant to SDCL 15-26A-87.1(A), considered all of the briefs filed in the above-entitled matter, together with the appeal record, and having concluded that it is manifest on the face of the briefs and the record that the appeal is without merit on the following grounds: 1. that the issues on appeal are clearly controlled by settled South Dakota law or federal law binding upon the states, 2. that the issues on appeal are factual and there clearly is sufficient evidence to support the jury verdict below, and 3. that the issues on appeal are ones of judicial discretion and there clearly was not an abuse of discretion (SDCL 15-26A-87.1(A)(1), (2) and (3), and now, therefore, it is

ORDERED that a judgment affirming the Judgment of the lower court be entered forthwith.

DATED at Pierre, South Dakota, this 23rd day of February, 1998.

BY THE COURT:
Robert A. Miller, Chief Justice

ATTEST: Clerk of the Supreme Court
PARTICIPATING: Chief Justice Robert A. Miller and Justices Richard W. Sabers, Robert A. Amundson, John K. Konenkamp and David Gilbertson.

APPENDIX B

IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
CR. 96-6584 JUDGMENT OF CONVICTION

STATE OF SOUTH DAKOTA, COUNTY OF MINNEHAHA

STATE OF SOUTH DAKOTA, Plaintiff,
vs
HARLAN L. JACOBSEN, d/b/a Solo RFD, Defendant

An Indictment was filed in this Court on or about December 12, 1996, charging the defendant with engaging in business as a retailer after his sales tax license was revoked (SDCL §10-45-48.1(6)), a class 6 felony. On December 9, 1996, defendant, appearing personally and *pro se*, was duly arraigned and pleaded not guilty to the count contained in the Indictment. That on March 10, 1997, a jury trail commenced, and the defendant appeared personally and pro se, and the State was represented by Donald N. Strstka, special assistant attorney general, and on March 11, 1997, on the second day of the trail the jury found the defendant guilty of engaging in business as a retailer after his sales tax license was revoked (SDCL § 10-45-48:1(6)), a class 6 felony.

It is therefore, the JUDGMENT OF THIS COURT that the defendant Harlan L. Jacobsen is guilty of engaging in business as a retailer after his sales tax license was revoked (SDCL § 10-45-48.1(6)), a class 6 felony.

SENTENCE

On June 5, 1997, at the sentencing hearing, the Court asked whether any legal cause exists to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

1. Ordered that defendant Harlan L. Jacobsen be convicted of engaging in business as a retailer after his sales tax license was revoked (SDCL §10-45-48.1(6), a class 6 felony); and sentenced to the Minnehaha County Jail for a period of ninety-five (95) days to commence on July 1, 1997, at 12:00 p.m.;

2. That ninety-four (94) days of the jail sentence is

suspended upon the following terms and conditions:

a. that defendant pay a fine in the amount of $1,000 on or before July 1, 1997;

b. that defendant pay Court costs in the amount of $26.50 on or before July 1, 1997;

c. that defendant engage in no business in violation of South Dakota tax laws for a period of eighteen (18) months; and

d. that defendant pay the cost of prosecution in the amount of $8,029.79 on or before July 1, 1997.

Dated this 5th day of June, 1997, at Sioux Falls, South Dakota.

BY THE COURT:

Gene Paul Kean, Circuit Judge

ATTEST: Roger Moan, Clerk, by Julie Smith, Deputy

Filed June 5, 1997, Minnehaha County, Roger D. Moan, Clerk Circuit Court

APPENDIX C

IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
CR. 96-6584
ORDER DENYING DEFENDANT'S MOTION TO DISMISS

STATE OF SOUTH DAKOTA, COUNTY OF MINNEHAHA

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
HARLAN L. JACOBSEN, d/b/a Solo RFD, Defendant

This matter having come before the Court, the Honorable Gene Paul Kean presiding, upon the defendant's motion to dismiss the indictment that charges himw ith one count of engaging in business as a retailer after his sales tax license has been revoked. That the defendant, pro se, brought on the motion for hearing and he appeared personally, and the State appeared through its special assistant attorney general, Donald N. Srstka.

The Court having heard the arguments of the parties at the hearing on february 78, 1997, and having considered the briefs of the parties, and being advised in the presmises, hereby Orders that defendant's motion be denied. That a copy of the Court's memorandum opinion dated February 27, 1997, is attached hereto and incorporated herein.

Dated at Sioux Falls, SD on March 5th, 1997.

BY THE COURT:

Gene Paul Kean, Circuit Judge

ATTEST: Roger Moan, Clerk
Filed March 5, 1997, Minnehaha County SD

MEMORANDUM

February 27, 1997
Mr. Donald N. Srstka
Special Assistant Attorney General
141 North Main, Suite 500
Sioux Falls SD 57104

Mr. Harlan L. Jacobsen
318 South Main Avenue
Sioux Falls SD 57104

RE: State v. Jacobsen, Cri. No. 96-6584

Dear Gentlemen:

This case comes before the Court on a Motion to Dismiss the Indictment on Constitutional Grounds filed by the defendant, Harlan Jacobsen. Mr. Jacobsen was indicted by a Grand Jury for continuing to do business after the revocation of his sales tax license. "SDCL § 10-45-2 provides:

There is hereby imposed a tax upon the privilege of engaging in business as a retailer, a tax of four percent upon the gross receipts of all sales of tangible personal property consisting of goods, wares, or merchandise, except as taxed by 10-45-3 and except as otherwise provided in this chapter, sold at retail in the State of South Dakota to consumers or users."

In 1995, retail sales of newspapers was deleted as an exemption under SDCL § 10-45-12-1. Under this new statutory scheme, Mr. Jacobsen's paper is subject to the 4% sales tax. His company paid the tax for a few months and then quit alleging the tax violated his First Amendment rights. Mr. Jacobsen did not specifically spell out whether he was seeking relief under the federal or state constitutions, but, since most of his oral argument at the motion hearing dwelled upon federal law, the Court will assume the challenge is federal in nature.

In Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, the Star Tribune argued it they paid two-thirds of the tax generated by a Minnesota state "use tax" and the tax violated its First and Fourteenth Amendment rights. 460 U.S. 575, 578, 103 S.Ct. 295, 75 L.Ed.2d 295, 300 (1983). The tax was imposed on the use on ink and paper, but the first $1000,000 worth of these items was exempt from the tax, thereby hitting papers with large circulations the hardest. The United State Supreme Court stated it was important that there was no indication of any "impermissible

or censorial motive on the part of the legislature" in imposing the tax. Id. at 460 U.S. at 580, 75 L.Ed.2d. at 301-02. "Clearly, the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems." Id. at 460 U.S. at 581, 75 L.Ed.2d at 302. This Court likewise finds that the South Dakota Legislature enacted a law, i.e., removed an exemption, without any improper design toward the First Amendment. There is no indication of an "impermissible or censorial" motive in imposing a sales tax on retail sales of newspapers in South Dakota. The law appears to be a revenue generating measure only, free of any bad purpose to unduly burden the media in general or newspapers specifically. And this is what distinguishes South Dakota's law from Minnesota's.

The Supreme Court found that the "use tax" singled out newspapers for the tax and was unique in the state's tax system. Id. 460 U.S. at 582, 75 L.Ed.2d at 303. The Court has upheld regulations of the press as long as the regulation applies to all business. Id. 460 U.S. at 583, 75 L.Ed.2d at 303. When there is a differential treatment, the tax just be justified by some special characteristic of the press and the state must assert a "counterbalancing interest of compelling important that it cannot achieve without differential treatment." Id. at 460 U.S. at 585, 75 L.Ed.2d at 305. Raising revenue cannot stand on its own as a justification for differential taxation of the press. Id. at 460 U.S. at 586, 75 L.Ed. at 305. The Court continued, an "alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press." Id. The South Dakota sales tax does just that: taxes non-exempt businesses generally.

The United State Supreme Court struck down the Minnesota tax because it singled out certain newspapers in violation of the First Amendment. Id. at 460 U.S. 591, 75 L.Ed.2d at 308-309. "A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to

justify its action." Id. at 460 U.S. 593, 75 L.Ed.2d at 309. More recently, in Swaggart v. California Equalization Board, the United States Supreme Court quoted Minneapolis Star Tribune, "Indeed, our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible." 493 U.S. 378, 388, 110 S.Ct. 688, 107 L.Ed.2d 796, 808 (1990). Accord Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), ("[A] genuinely nondiscriminatory tax on the receipts of newspapers would be constitutionally permissible"). In Swaggart the Court upheld the state sales tax saying that the tax was not a tax on the dissemination of religious materials, that the group was not being singled out for a more burdensome tax, that the tax was not a prior restraint on speech, and that although there was a cost to the organization associated with the tax, the tax was not different from other laws or regulations the organization had to comply with. See generally Swaggart, 493 U.S. 378, 100 S.Ct. 688, 107 L.Ed.2d 796.

Mr. Jacobsen argues that several federal courts have ruled in his favor on this point. However, a review of his cases shows that the issue he was fighting dealt with the actual distribution of the newspaper, not whether the newspaper could be taxed. Distribution is not involved in this case. Mr. Jacobsen argues that the tax places a heavy financial burden on the distribution of his paper. This argument is unpersuasive and unsubstantiated. Merely because Mr. Jacobsen would have to raise his rates to cover the tax or pay the tax from his gross revenue because he cannot readjust his vending machines to collect an extra nickel does not prove the tax is discriminating in nature. If the tax burdens all the businesses equally, it is not inherently discriminatory even if it causes a dilemma of this nature. In the Minneapolis Star Tribune case at footnote 10, the Supreme Court stated that this was a choice the publisher had to face, but it was not a constitutional problem. See generally Swaggart, 493 U.S. 378, 110 S.Ct. 688, 107 L.Ed.2d 796. A nondiscriminatory tax is constitutional. Mr. Jacobsen also argues that he is a publisher, not a retailer. For purposes of this tax, he is both.

According to Minneapolis Star Tribune and Swaggart, the Motion to Dismiss the Indictment is Denied. Mr. Srstka shall

prepare an Order to this effect within 10 days. The trial scheduled for the week of March 10th will proceed as scheduled.

Best Regards,
Gene Paul Kean
Circuit Court Judge

GPK/rmj